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No. 94-1207

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.
PETITIONER

V.

TOWN OF MONROE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF CONNECTICUT

PETITIONER'S REPLY BRIEF

ERSKINE D. MCINTOSH
Counsel Of Record For The Petitioner
900 Chapel St.
Suite 630
New Haven, Ct. 06510-2802
(203) 787-9994

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I. REPLY TO FACTUAL ASSERTIONS

The respondent in its brief, pp. 8,11, contends that the trial court found that the petitioner "voluntarily" deeded the land to the respondent and that there was "no ... imposition". As discussed infra, the trial court never made such findings.

II. REPLY REGARDING JURISDICTION

The respondent in its brief, pp. 13-16, has raised the issue of subject matter jurisdiction which was never raised in the Connecticut courts. The Connecticut law clearly does not support the respondent's current position. The respondent in its brief, p. 14, contends that the petitioner's claims are barred for lack of subject matter jurisdiction because in "Connecticut, the rule is **absolutely clear that all claims** pertaining to a subdivision application granted or denied must be litigated as part of an administrative appeal."(emphasis added). The respondent also states that "(u)nder Connecticut General Statutes, Section 8-28, a party aggrieved by the action of a planning and zoning commission in connection with a subdivision has the right to file an administrative appeal of such conduct. It is the **only right**. An aggrieved party may not collaterally attack a municipal act for which it has a statutory right to institute an administrative appeal..." (emphasis added). On page 14 of its brief, the respondent claims that "(i)n the absence of a proper appeal under Connecticut General Statutes, Section 8-28, the court has no subject matter jurisdiction." As authority for the last claim, the respondent cites Upjohn Co. v. Zoning Board of Appeals, 224 Conn. 96, 104, 616 A2d 793 (1992), and Butzgy v. Town of Glastonbury, 203 Conn 109, 114, 116, 523 A.2d 1258 (1987). The respondent in its brief, p. 15, concludes that "(s)imply stated, Petitioner's claim is barred because of his failure to raise it as part of the 1986 subdivision approval which was conditioned upon the land dedication."

Thus, according to the respondent there are no exceptions to the rule that a party can only challenge a zoning authority by means of a statutory appeal. However, not only does the general law refute the respondent's current claim but the two specific cases cited by the respondent clearly reject the respondent's claim. The case cited by the respondent of Upjohn Co. v. Zoning Board of Appeals, supra, 224 Conn. at 101, actually states that "certain actions of zoning authorities may be attacked in an independent action after the time period for an appeal has passed." More importantly, the Butzgy case cited by the respondent specifically holds that such a rule against a non statutory appeal is "subject to a few limited exceptions, one being that a party may bring an independent action to test certain **constitutional** issues without first having resorted to an administrative appeal." Butzgy v. Glastonbury, supra, 203 Conn. at 121 (emphasis added). The court in Butzgy cited Connecticut Light and Power Co. v. Norwalk 179 Conn 111, 117, 425 A.2d 576 (1979) where it was held that the "failure to exhaust administrative remedies is not however equally conclusive when the issue is the **constitutional propriety of the procedures** used by the administrative agency in discharge of its statutory responsibility. Although such questions also might have been raised on direct appeal, we are not prepared to say that direct appeal is necessarily the exclusive route for testing basic **constitutional infirmity**." (emphasis added). In Friedson v. Westport 181 Conn. 230, 233,435 A.2d 17 (1980) it was held a party can bring a separate action independent of a statutory right of appeal from an administrative agency if the independent action challenges "the **constitutionality** of the [agency's] actions." (emphasis added). A collateral attack can be brought to test the "validity of [a] zoning regulation". Beacon Falls v. Posick 17 Conn. App. 17, 39, 549 A.2d 656 (1988), reversed on other grounds, 212 Conn 570, 563 A.2d 285 (1989).

Since the petitioner has clearly focused his independent action on the unconstitutionality of the respondent's acts, then the Court has subject matter jurisdiction. This Court itself has noted that the "doctrine of exhaustion of administrative remedies .... is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions" and should not "be applied blindly in every case." McKart v. United States, 395 U.S. 185, 193, 201, 89 S.Ct. 1657, 23 L.Ed. 2d 194 (1969).

Moreover, Connecticut law also allows independent actions seeking equitable relief. In Bianco v. Darien 157 Conn 548, 553-554, 254 A.2d 898 (1969), the court first noted the above general rule disfavoring an independent action when a party did not pursue a statutory right of appeal. However, the court ruled that the case before the court was "an action seeking **equitable relief** ... involv(ing) an alleged course of conduct by the plaintiffs and various town officials over a period of **thirty-six years**. The relief sought and the issues raised are distinctly **equitable** in nature. To hold that the plaintiffs had an adequate remedy at law which required that they exhaust their administrative remedies before the zoning board of appeals is to ignore the claims made and the nature of the action." Id., (emphasis added). Thus the passage of time, such as in the present case, can actually be a factor which shows why such independent actions should be allowed and why it is unfair to only allow actions that must be brought within a short and arbitrary period of time. In Reynolds v. Soffer, 183 Conn. 67, 69-71, 438 A.2d 1163 (1981), the court rejected a defendant's claim of lack of jurisdiction due to the plaintiff's failure to exhaust administrative remedies and rejected the "defendants' argument that the plaintiff's allegations do not merit equitable ... relief."

As noted in the Petition For A Writ Of Certiorari (hereafter referred to as Petition) pp. 6, 11, fn 1, the petitioner's counterclaim sought the equitable relief of a

constructive trust based on Connecticut common law. As mentioned in the petitioner's brief to the Appellate Court of Connecticut, pp. 1, 14-17, in Connecticut the common law allows for the "imposition of a constructive trust by **equity** (as) a remedial device designed to prevent unjust enrichment.... In order for a constructive trust to be imposed, the plaintiff must allege fraud, misrepresentation, **imposition**, circumvention, artifice, or concealment or abuse of confidential relations." Wing v. White 14 Conn App. 642, 644, 542 A.2d 748 (1988) (emphasis added) "A constructive trust arises ... against one who ... by duress or ... by commission of wrong, or by any form of unconscionable conduct,...or questionable means or who in **any way against equity** and good conscience, either has **obtained or holds** the legal right to property which he ought not in **equity** and good conscience, hold and enjoy." Spatola v. Spatola 4 Conn App. 79, 81, 492 A.2d 518 (1985) (emphasis added). In the present case, although the trial court found that there was no duress, the court did not discuss the other factors such as imposition which could cause a constructive trust. The court found that it was "not necessary to discuss the (petitioner's) claim of a constructive trust" in light of the court's rulings against the petitioner on his constitutional claims. (Petition, App. pp. 9a, 11a).

The respondent in its brief, p. 15, asks this Court to take guidance from Justice Souter's opinion as a state court justice in Town of Auburn v. McEvoy 553 A.2d 317 (1988). However, Justice Souter filed a dissenting opinion in Dolan v. City of Tigard 512 U.S. ___, 114 S.Ct. 2309, 2330, 129 L.Ed. 2d 304 (1994). Since Justice Souter's opinion does not reflect the majority opinion in Dolan, this Court should not necessarily take guidance from his earlier view expressed in Auburn as to when cases like Dolan can be utilized by a landowner in court.

III. REPLY TO ARGUMENT CLAIMING NO UNCONSTITUTIONAL TAKING

The respondent in its brief, pp. 11-12, 18-19, attempts to broaden its open space regulation to include matters outside its scope. The open space regulation is Section 3.4 of the Monroe Land Subdivision Regulations which was fully quoted in the trial court's Memorandum of Decision (See Petition, App. p. 7a-8a) and is also fully quoted in the respondent's brief, p. 19. That subdivision regulation states in part that "(i)n all subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission." Since the trial court ruled that the land taken has not been used for parks and playgrounds (see Petition, App. p. 8a), then the respondent feels compelled to broaden the regulation by interpretation to include things such as light and air. However, Section 3.4 is unambiguous and needs no interpretation. It must be remembered that "zoning regulations are in derogation of common law property rights and should not be extended by implication." Melody v. Zoning Board of Appeals, 158 Conn. 516, 521, 264 A.2d 572 (1969). "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances....We have stated that courts are not at liberty to create an exception where [a legislature] has declined to do so." Freytag v. C.I.R. 501 U.S. 868, 873-874, 111 S.Ct. 2631, 2636, 115 L. Ed. 2d 764 (1991). "A zoning regulation must be interpreted in light of our ordinary rule that where the language of the statute is clear and unambiguous, the courts cannot, by construction, read into statutes provisions which are not clearly stated." Roraback v. Planning and Zoning Commission, 32 Conn. App. 409, 413 628 A.2d 1350 (1993). Where the statute's "language is plain and unambiguous, we go no further." Sanzone v. Board of Police Commissioners 219 Conn 179, 187, 592 A.2d 912 (1991).

Furthermore, the Master Plan mentioned in the respondent's brief, pp. 18-19, enjoys no special status as a surrogate subdivision regulation since it can only be used as an interpretative tool. A "town plan is merely advisory...(and) can operate only as an interpretive tool." Smith v. Zoning Board of Appeals, 227 Conn. 71, 87-88, 629 A.2d 1089 (1993). Also, even the preamble to Section 3.4 can only be used as an interpretive tool. See Jurgenson v Fairfax County,745 F.2d 868,885(CA4, 1984).

Since Section 3.4 is unambiguous when it states that the respondent can take "open spaces for parks and playgrounds", then a court can not add to it by stating that the respondent can take open spaces for other purposes such as for light and air. Such an interpretation allowing the respondent to take land for almost any purpose would surely violate the principles set forth in Dolan,supra, and Nollan v. California, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

Also, there is a maxim of statutory construction that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 1753, 64 L.Ed. 2d 381 (1980). A "maxim of statutory construction [is] that specific language covering the general subject matter...will prevail over general language of the same or another statute that might otherwise prove controlling." Gifford v. Freedom of Information, 227 Conn. 641, 661, 631 A.2d 252 (1993).

Thus, the respondent's attempt in its brief, pp. 18-19, to enlarge Section 3.4 by referring to the respondent's broad Master Plan must fail because Section 3.4 is unambiguous and thus allows no interpretation, and furthermore even if the broad wording of the Master Plan was incorporated into Section 3.4, the specific words of Section 3.4 control over any general words of the Master Plan.

The key issue is not so much whether Section 3.4 is unconstitutional on paper but whether its application in this specific case was unconstitutional in light of the principles set forth in Nollan and Dolan. Section 3.4 could be constitutional if there was a need for specific open spaces to lessen the impact of a specific subdivision but Section 3.4 becomes unconstitutional when it blindly and capriciously demands 10% of any major subdivision as the price for approving such subdivisions. A government "must make some sort of individualized determination that the required dedication is related in both nature and extend to the impact of the proposed development" and it can not rely on its own "conclusory statement(s)". Dolan, supra 114 S.Ct. 2319-2320, 2322. A finding that the land demanded "could offset some" of the development's impact is insufficient. Id, 2322.

The respondent in its brief, pp. 20-25, attempts to satisfy the above requirement with ad hominem rhetoric and conclusory statements. The respondent first tries to downplay the need for such an individualized determination by concluding that the petitioner did not really care about the issue of open spaces and saw it as a "non issue" and he thus "voluntarily conveyed" the land to the respondent (see respondent's brief, p. 20, including fn 17). The respondent earlier in its brief, p. 11, erroneously states that the "trial court specifically found that there was no duress or imposition, but simply a decision by the Petitioner to voluntarily comply with a regulation for subdivisions of this nature." The trial court never found that the conveyance was voluntary and never decided whether the respondent committed an act of imposition when it demanded the land. The trial court ruled that the respondent's attorney "honestly believed" that the subdivision regulations permitted his request for the deed and therefore his actions were "not wrongful", and thus the court concluded that the petitioner "failed to demonstrate duress". (Petition, App. p. 9a). The trial court never decided the critical issue of whether the respondent imposed on the petitioner when

it demanded the land. "We think the word 'imposed' ... must be given the meaning which the standard dictionnaries give it ... : To lay as a burden, levy, inflict, or enforce; as by authority, power, or influence; as to impose taxes or penalties...." National Bank Of Commerce v. Allen, 223 F. 472, 477(CA 8, 1915). See Black's Law Dictionnary, Sixth Edition. Thus an imposition can be a legal rather than a wrongful act such as the legal imposition of a tax, and it is not the same as an act of duress. Although the trial court ruled that there was no duress (Petition, App. p. 9a), the court failed to contend with the overwhelming evidence that the respondent imposed a type of tax on the petitioner in that the respondent was required to pay up 10% of his subdivision to get the subdivision approved. Such an imposition in these circumstances results in a constructive trust. See Wing v. White, supra,.

The evidence establishing imposition included the court's finding that the respondent had "insisted on the (petitioner) providing a deed for the lot" (Petition, App. p. 9a). At the court hearing, the petitioner's attorney testified that the respondent's attorney told him in 1986 that "one of the conditions [for approval of the subdivision] was that we have to ... deed the land .... That was a condition of approval of the Town in 1986." (Trial transcript of July 15, 1993, hereafter referred to as T, p. 15). The trial court noted the petitioner's testimony that he "did not want to give" up the land but believed that he "had to give up" the land to get the approval for the subdivision. (Petition, App. pp. 8a, 9a). As mentioned in Nollan, supra, 483 U.S. 834, n. 2, "the yielding of a property interest [to get zoning approval] can not be regarded as establishing (a) voluntary exchange."

The scenario in the present case was the type of zoning extortion condemned in Dolan, supra, 114 S.Ct. 2317, and Nollan, supra, 483 U.S. 837. Extortion need not be a sinister demand but "can manifest itself in a more subtle form such as custom or expectation." United

States v. Ward 914 F.2d 1340, 1346 (CA9, 1990). See United States v. O'Connor, 910 F.2d 1466, 1468 (CA7, 1990). Thus, the act of the petitioner of deeding the land was never "a non issue" or "voluntary" but fit the typical pattern of someone who knows he must pay extortion quietly or suffer the consequences of having his subdivision application rejected. Concerning the issue of whether the deeding of the land was imposed and involuntary, this Court can make its own finding since the issue was previously undecided and also involves a mixed question of law and fact. See Fiske v. Kansas, 274 U.S. 380, 385-386, 47 S.Ct. 655, 71 L.Ed. 1108 (1927).

The respondent in its brief, p. 21, claims that the land taken "satisfied the Town's interest of providing an aesthetic and ecological balance for the area including the need for light land air ..." This is the type of self serving "conclusory statement" that this Court in Dolan ruled to be inadequate. Dolan supra 114 S.Ct., at 2322.

The respondent in its brief, p. 24, states that the "**Town decided that the set aside was roughly proportional and rationally related to its interest in providing open space for Town residents, not only those located near the subdivision but also all other Town residents.**" (emphasis added). However, the record is clear that no such decision on proportionality was ever made. The respondent's zoning officer, Daniel Tuba, testified that a study was never done as to whether the land given up by petitioner was needed to fulfill the needs of the respondent. He testified that the respondent has not had any discussion or plans to use the land nor was there any present intention as to what will be done with the land (T pp 115, 73-75). Tuba also testified that the respondent owns over 400 acres and that there was nothing unique about the open spaces taken from the petitioner anymore than any other open space set aside by a developer (T 80, 81). The lack of such an individualized decision by the respondent concerning proportionality is shown by the

court's finding that the respondent required all subdivisions of ten or more lots to give approximately ten percent of the development to the respondent as open spaces. (Petition, App. p. 8a). Furthermore, the court's findings that the land "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground" (Petition App. p. 8a) only tends to refute any claim that the respondent actually made any individual decision on why the land was needed. The lack of use shows a lack of a decision on how it would be used.

The respondent in its brief, p. 21, refers to this Court's previous ruling in Agins v. City of Tiburon 447 U.S. 255, , 100 S Ct. 2138, 65 L Ed. 2d 106 (1980) which recognized the importance of open space regulations. However, a government can only take land from a developer if that government can make an individualized determination that the land taken is related both in nature and extent to the impact of the development. Dolan, supra, 114 S.Ct. 2319-2320. If the open space is merely part of a "comprehensive program" serving the public interest, then the government can still take the land "by using its power of eminent domain...but if it wants [the land] **it must pay for it.**" Nollan v. California, supra, 483 U.S. 841-842. (emphasis added). Moreover, in the present case the respondent could have successfully defended the claim of constructive trust with a defense of laches if it had made "expenditures for improvements" on the land. See Lake Caryonah Imp. Ass'n v. Pulte Home Corp., 903 F.2d 505, 510(CA7, 1990). But the respondent not only never paid for the land but never spent a dime on it. If the respondent wants to keep the land, then the respondent should pay for it or provide an individualized determination that its taking is related both in nature and extent to the impact of the subdivision.

ERSKINE D. MCINTOSH
COUNSEL OF RECORD FOR THE PETITIONER